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No. 71-232

In the Supreme Court of the United States

OCTOBER TERM, 1971

THE NALLE CLINIC, PETITIONER

v.

JAMES D. HODGSON, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 35–41) is reported at 444 F. 2d 17. The opinion of the district court (Pet. App. 27–34) is reported at 307 F. Supp. 1122.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 1971. The petition for a writ of certiorari was filed on August 14, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

446-713—71

QUESTION PRESENTED

Whether a medical clinic, engaged in diagnosing and treating human ailments, is a "retail or service establishment" within the meaning of the Fair Labor Standards Act and was therefore not within the Act's coverage under Section 3(s)(3) of the Act, as that Section read from 1961 to 1966.

STATUTE INVOLVED

Sections 3(r), 3(s)(1), 3(s)(3) and 13(a)(2) of the Fair Labor Standards Act of 1938 (c. 676, 52 Stat. 1060, c. 736, 63 Stat. 910, 29 U.S.C. 201 *et seq.*), as amended in 1961 (P.L. 87–30, 75 Stat. 65, at 66 and 71), are set forth at pages 3–5 of the petition.

STATEMENT

This action was brought by the Secretary of Labor under Section 17 of the Fair Labor Standards Act, 29 U.S.C. 217, to restrain petitioner from violating the Act's recordkeeping provisions (29 U.S.C. 211(c) and 215(a)(5)) and the minimum wage (29 U.S.C. 206(a)) and overtime (29 U.S.C. 207(a)(1)) standards established by the Fair Labor Standards Amendments of 1966 (80 Stat. 830) for employees of enterprises brought within the Act's coverage by the Fair Labor Standards Amendments of 1961. Petitioner admitted that its maids and janitors—the employees in question—were not paid in accordance with the Act's standards (Pet. App. 36), but denied that it was subject to the Act. Claiming that it was a "retail or service establishment" as defined by Section 13(a)(2)

of the Act, petitioner noted that it did not meet one of the tests then prescribed for such establishments by Section 3(s)(1) as a precondition to coverage, in that it did not annually purchase goods originating from outside the State in the amount of $250,000 (*ibid.*). If, on the other hand, petitioner was not a "retail or service establishment," it was subject to the Act under Section 3(s)(3).[1]

Petitioner is a medical clinic which was incorporated by a number of doctors for the group practice of medicine in Charlotte, North Carolina (Pet. App. 29). The clinic's income is derived solely from charges for medical services, and in 1969 its annual gross income was almost $2 million (A. 23–24).[2] The clinic does not collect or remit sales taxes on any of its income, nor is it required to do so under North Carolina's retail sales tax law (A. 24).

The district court dismissed the action, sustaining petitioner's contention that the clinic was a "retail or service establishment," and that it did not meet one of the tests prescribed for the coverage of such establishments by Section 3(s)(1) (Pet. App. 33–34). The court of appeals reversed, holding that the clinic was not engaged in "retail" pursuits within the meaning of Section 13(a)(2) and thus was not a "retail or service establishment" (Pet. App. 39) and that it was, accord-

[1] Section 3(s) was amended in 1966 and no longer refers to a "retail or service establishment." 29 U.S.C. 203(s), 80 Stat. 837.

[2] "A." references are to the appendix filed in the court of appeals.

ingly, subject to the Act under Section 3(s)(3) (Pet. App. 41).

ARGUMENT

The decision below is correct, is consistent with decisions of this Court construing the phrase "retail or service establishment" as used in the Act, and does not conflict with a decision of any other court of appeals. Further review by this Court is thus unwarranted.

1. Under the Act, no concern is a "retail or service establishment" unless the sales or services of that concern meet the retail concept contemplated by Section 13(a)(2). The holding below that medical services rendered by physicians engaged in the group practice of medicine are not "retail" services is consistent with this Court's observations that "not everything the consumer purchases can be a retail sale of goods or services" (*Idaho Metal Works* v. *Wirtz*, 383 U.S. 190, 203; *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290, 295), and that the term "service establishment" is limited to establishments which "are comparable to the local merchant, corner grocer or filling station operator" (*Roland Co.* v. *Walling*, 326 U.S. 657, 666; *Phillips Co.* v. *Walling*, 324 U.S. 490, 497). The holding below also accords with the long-standing administrative position that such professional firms as "legal firms, accounting firms, [and] engineering firms," although rendering services in the "broad sense" of that term, are not "sufficiently similar in character to retail establishments to be considered 'service estab-

lishments' within the meaning of Section 13(a)(2)" (Interpretative Bulletin No. 6, issued December 17, 1938, 1942 Wage and Hour Manual 334–335, ¶¶ 29–30, and reissued in 29 C.F.R. 779.317). Administrative interpretations of this type, as this Court recognized, "are entitled to great weight" (*Roland Co., supra,* 326 U.S. at 676, 677, n. 10, quoting the same paragraph of Interpretative Bulletin No. 6 set forth above).[3]

Petitioner's contention that every business which renders services to the individual consumer is, for that reason alone, a retail business rests on the erroneous view that Congress, when it amended the Act in 1949, disapproved this Court's entire holding in *Roland, supra.* While, as this Court noted in *Kentucky Finance, supra,* 359 U.S. at 294, Congress expressed dissatisfaction with certain aspects of the *Roland* decision, it not only approved the result reached in *Roland,* but also made clear that the 1949 Amendments were not intended to "change the prior law"

[3] This bulletin, as most recently revised in April 1970, enumerates "dentists' offices" and "doctors' offices" in the "[p]artial list of establishments lacking 'retail concept'" (35 Fed. Reg. 5856). Petitioner objects to this revision while the instant litigation was pending, claiming that it deprives it of due process (Pet. 20–23). The non-retail character of medical clinics, however, had been the subject of several earlier opinion letters by the Administrator, including one issued on June 18, 1964—more than three years before the instant complaint was filed. The June 18, 1964, opinion letter (set forth in pertinent part as an appendix to this brief) addressed itself to the very issue presented here—stating that the coverage of medical clinics should be determined by applying the standards of Section 3(s)(3) rather than those prescribed by Section 3(s)(1). See also Opinion Letter, January 18, 1967, WHM 91:1156e, and Opinion Letter, January 11, 1968, WHM 91:1156kkk.

and that the term "retail or service establishment" did not extend to such businesses as "banks, insurance companies, building and loan associations, credit companies, newspapers, telephone companies, gas and electric utility companies, telegraph companies, etc., because there is no concept of retail selling or servicing in these industries" (*Kentucky Finance, supra*, 359 U.S. at 295). As this Court pointed out in *Idaho Metal Works, supra*, "[t]he legislative recital of telephone, gas and electric, and credit companies along with a number of others as businesses outside the [retail or service] exemption * * * demonstrates that not everything the consumer purchases can be a retail sale of goods or services" (383 U.S. at 203).

2. Contrary to petitioner's contention (Pet. 23–25), the decision below does not conflict with the decisions in *Central Aguirre Sugar Co.* v. *Castro*, 330 F. 2d 68 (C.A. 1), and *Juarez* v. *Kennecott Copper Corporation*, 225 F. 2d 100 (C.A. 10). In those two cases, the question was whether certain employees were "closely related and directly essential" to the production of goods for commerce simply because their employers provided hospital care to employees of interstate producers. The courts held that they were not. Coverage in this case, however, turns not on the activities of individual employees, but on petitioner's status as an "enterprise engaged in commerce" as defined in Section 3(s) of the Act. Petitioner concededly meets the threshold requirement of that Section in that it has "employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person * * *" (Pet. App. 31).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1971.

APPENDIX

Excerpts from the June 18, 1964, opinion letter attached to the Secretary's answer to Defendant's Interrogatories, second set (Docket Entry No. 11):

Mr. JOHN D. STRINGER,
Associate Minority Council,
Committee on Labor and Public Welfare,
United States Senate,
Washington 25, D.C.

DEAR MR. STRINGER: This is in further reference to your letter of May 6, 1964, with which you enclosed excerpts from a letter directed to Senator Barry Goldwater, concerning the application of the Fair Labor Standards Act to employees of a clinic.

* * * * *

The clinic and its operations might constitute an enterprise engaged in commerce or in the production of goods for commerce under section 3(s)(3) of the act. Section 3(r) of the act defines an "enterprise" to mean the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units, including departments of an establishment operated through leasing arrangements. Section 3(s)(3) brings within the coverage of the act any employee employed by any establishment of any such enterprise which has employees engaged in commerce or in the production of goods for commerce if the annual gross volume of sales of such enterprise is not less than

$1,000,000. It seems clear that the association with which we are here concerned is performing activities through unified operation or common control for a common business purpose. If the clinic has employees who are regularly engaged in commerce or in the production of goods for commerce so as to meet the requirements of coverage on an individual basis as explained above, and if the requisite $1,000,000 volume of sales or business is met, enterprise coverage under section 3(s)(3) would extend to all employees, not otherwise covered on the traditional individual basis, unless specifically exempt.

* * * * *

Sincerely yours,

CLARENCE T. LUNDQUIST,
Administrator.

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